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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

17 CR 630 (ER)

5 MARK S. SCOTT,

6 Defendant.

7 -----x
8 New York, N.Y.
9 November 4 , 2019
9:30 a.m.

10 Before:

11 HON. EDGARDO RAMOS,

12 District Judge

13 APPEARANCES

14
15 GEOFFREY S. BERMAN,
16 United States Attorney for the
17 Southern District of New York
18 CHRISTOPHER DiMASE
19 NICHOLAS FOLLY
20 JULIETA V. LOZANO
21 Assistant United States Attorneys

22 COVINGTON & BURLING LLP
23 Attorneys for Defendant

24 BY: ARLO DEVLIN-BROWN
25 KATRI STANLEY
-AND-
DAVID M. GARVIN

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1 THE COURT: OK folks. It's 9:30.

2 (Case called)

3 MR. DIMASE: Good morning, your Honor. Christopher
4 DiMase for the government. Also present at counsel table with
5 me are AUSA Nicholas Folly, Special Assistant United States
6 Attorney Julieta Lozano, paralegal specialist Nick Barile and
7 Special Agent Ronald Shimko from the FBI.

8 THE COURT: Good morning.

9 MR. DEVLIN-BROWN: Good morning. Arlo Devlin-Brown
10 for Mark Scott.

11 MR. GARVIN: Good morning. David Garvin on behalf of
12 Mark Scott who is also present.

13 THE COURT: Good morning to you all. Everyone can be
14 seated.

15 MR. DIMASE: Your Honor, I would also note there are
16 two IRS CI case agents in the courtroom as well, John Abram and
17 Rich Reinhart.

18 THE COURT: OK. This is a rather cavernous courtroom.
19 Already I noted that Mr. DiMase, who I don't usually have
20 trouble hearing, was standing away from the microphone. So,
21 please, when you speak in this room speak close to a
22 microphone. Please direct the witnesses to speak loudly,
23 clearly and into the microphone so that I'm not constantly
24 berating you and them.

25 I just wanted to very quickly go over again some of

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1 the mechanics. As we discussed last week, we're going to have
2 twelve jurors obviously and four alternates. If everyone uses
3 all of their peremptories, that means that we should have 28
4 potential jurors in the box at any given time. And I will give
5 you one peremptory for the alternates. So that's another six.
6 So we'll have 34 people potential jurors in the box at any
7 given time.

8 There are 18 seats in the jury box. So we'll use
9 these 18 and then we'll use the first two benches. So you
10 gentlemen are going to have to move at some point. There will
11 be 16 in the first two benches; eight in the first bench and
12 eight in the second bench. So you can mark your charts
13 accordingly. And it will be potential juror no. 1 through
14 potential juror no. 34.

15 There are a number of motions that are still open.
16 I'm happy to go over those now.

17 As I understand from the government, they are not
18 looking at this point to proffer the particular excerpt from
19 the tape of Mr. Scott's postarrest statement that is the
20 subject of continuing controversy. So given that
21 representation we can hold that decision in abeyance.

22 And how do the parties wish to proceed otherwise with
23 respect to the open motions?

24 Mr. DiMase?

25 MR. DIMASE: Your Honor, we're happy to address them

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1 in whichever order you'd like. I believe the two pending
2 motions now are the motion to suppress the WhatsApp messages
3 recovered from Mr. Scott's now wife's cellphone and the issue
4 regarding the cross-examination of a case agent on the
5 authenticity of certain recordings.

6 THE COURT: Let's do the case agent one first. First
7 of all, can someone tell me what happened here in terms of the
8 investigation?

9 Did Ms. Ignatova have inside information about an
10 investigation? What can you tell me in that regard so that I
11 understand the context.

12 MR. DIMASE: One moment, your Honor.

13 (Counsel confer)

14 MR. DIMASE: There are a couple of facts that I think
15 I can shed some light on for the court that may help. Much of
16 this we anticipate that the cooperating witness will testify
17 about at the trial, your Honor.

18 So Ms. Ignatova had a corporate espionage-type person
19 on retainer, for lack of a better word, and she utilized that
20 person to obtain information about pending law enforcement
21 investigations all over the world and also to conduct
22 essentially espionage against people within her own
23 organization when she suspected that they might be up to
24 something.

25 What I expect the Court will hear is that Ms. Ignatova

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1 hired this -- well, this person that she had hired arranged to
2 purchase an apartment below that of a person named Gilbert
3 Armenta who we expect the Court will hear quite a bit about at
4 trial. Mr. Armenta was the person who introduced Mr. Scott,
5 the defendant, to Ms. Ignatova in the first instance and he was
6 also a money launder for OneCoin. He also had an intimate
7 relationship with Ms. Ignatova. They were essentially dating.

8 So Mr. Armenta was living in this apartment in the
9 United States with his wife. There had been representations
10 that he would leave his wife for Ms. Ignatova. She, through
11 this espionage person, bought the apartment below his and
12 installed a recording device -- that's what we expect the
13 cooperating witness who is going to testify at trial to say --
14 in the ceiling and then obtained recordings of what Mr. Armenta
15 was saying to his wife in the apartment. And she learned
16 through those recordings that Mr. Armenta was telling his wife
17 he wasn't going to leave the wife but also, and more critically
18 in some ways, that Mr. Armenta was actually cooperating with
19 the government and that he was cooperating with the FBI against
20 her.

21 THE COURT: OK.

22 MR. DIMASE: And it's within a very short period of
23 time after that -- this is all in around September 2017. It's
24 in October 2017 that she disappears.

25 THE COURT: Then did she also receive information from

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1 this person concerning actual law enforcement investigations?

2 MR. DIMASE: Yes, your Honor.

3 THE COURT: OK.

4 MR. DIMASE: Among other people. I don't know that
5 that was her only source for such information; that she -- we
6 expect that this cooperating witness who will testify at the
7 trial will talk about how she obtained information from this
8 person and others about confidential facts regarding law
9 enforcement investigations.

10 THE COURT: Including investigations in the United
11 States?

12 MR. DIMASE: Well, I think the -- one moment, your
13 Honor.

14 (Counsel confer)

15 MR. DIMASE: Yes. Including about investigations in
16 the United States through various means, one of which was the
17 installation of this recording device in the cooperating
18 witness's -- the apartment below him which --

19 THE COURT: Where did Mr. Armenta live at the time?

20 MR. DIMASE: Fort Lauderdale or somewhere in south
21 Florida in the vicinity of Fort Lauderdale.

22 THE COURT: Tell me the context about these particular
23 phonecalls that you are looking to put in.

24 MR. DIMASE: Your Honor, the first phonecall -- well
25 there are two phonecalls. One is on September 24 and one is on

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1 September 28. The September 24 call, the government is seeking
2 to play just a very small portion of it in which Ms. Ignatova
3 makes clear to Mr. Armenta that she had obtained a recording of
4 him in which he said he was not going to be leaving his wife.
5 And that will corroborate the testimony of the cooperating
6 witness at the trial that, in fact, Ms. Ignatova had bought the
7 apartment below and had recorded the conversations and placed
8 her ultimate disappearance in important context, the idea that,
9 in fact, this person was being recorded and that there was a
10 basis for her to know that he was cooperating with law
11 enforcement. So that's really the focus of the first excerpts
12 from the first call.

13 THE COURT: And Mr. Shimko was there at that
14 recording?

15 MR. DIMASE: Mr. Shimko was present for that
16 recording. That's correct.

17 The second recording is on September 28. And in that
18 recording there is some discussion which the government does
19 not intend to offer. The Court may have seen it in the longer
20 version of the transcript about certain investigations that are
21 going on. But to be clear the government anticipates that
22 there will be testimony about Ms. Ignatova and Mr. Scott and
23 Mr. Armenta all employing countersurveillance techniques
24 throughout the time period that they were engaged in this
25 conspiracy by using e-mail addresses that they believed were

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1 harder to intercept, by using WhatsApp which is end-to-end
2 encrypted, by talking on cryptophones, by traveling to meet in
3 person, in a number of different ways.

4 The surveillance consciousness is not something that
5 developed in September of 2017. The evidence will be clear
6 that this is a thread that runs throughout the communications
7 between these people. And in this particular set of excerpts
8 Ms. Ignatova is telling Mr. Armenta be careful, don't use
9 e-mail, don't -- speak on encrypted lines, you have to speak on
10 encrypted phones and face-to-face meetings only, everybody is
11 watching, they can drop in and intercept us essentially. And
12 that will corroborate the anticipated testimony of the
13 cooperating witness regarding these countersurveillance
14 techniques that were being used, including by Mr. Scott, the
15 defendant, during the course of the conspiracy.

16 THE COURT: Was Special Agent Shimko strictly speaking
17 the case agent throughout this investigation?

18 MR. DIMASE: There were several case agents but he is
19 the lead case agent from the FBI, yes, your Honor. And he was
20 present for both of the calls. And the only testimony that we
21 intend to introduce at the moment is simply that he was present
22 on those particular days with Mr. Armenta who placed a call and
23 agreed to the recording of the call and that these excerpts are
24 true and authentic portions of the call that Mr. Shimko
25 witnessed Mr. Armenta make. That is the -- that is basically

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1 the testimony. And we did try to get a stipulation on the
2 authenticity of the calls and the defense has declined to
3 stipulate.

4 THE COURT: OK.

5 MR. DIMASE: That's the only reason that we intend to
6 call Mr. Shimko.

7 THE COURT: OK.

8 Mr. Devlin-Brown.

9 MR. DEVLIN-BROWN: Thank you, your Honor.

10 I'd just like to provide one more piece of context
11 that I think might be helpful in addition to what Mr. DiMase
12 just said about the relationship between Mr. Armenta and Ruja
13 and what's going on when these calls occur in September 2017.
14 And that additional piece of context is I believe -- and the
15 government can correct me if I'm wrong -- but the last evidence
16 of any communications between Mr. Scott and Ms. Ignatova would
17 have been February 2017; so, many months before. As we talked
18 about at the last conference, Mr. Scott had returned all of the
19 money to investors save for a litigation reserve in July. And
20 I understand the Court's ruling about the admissibility of
21 coconspirator statements. That's not what we're contesting
22 here. But it will be part of the defense that Mr. Scott was
23 gone by then and anything people are doing in September 2017
24 has nothing to do with Mr. Scott.

25 So, our concern with the excerpts standing alone

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1 anyway without either a case agent to give it a little context
2 or playing more of the excerpt, that could potentially do it,
3 is that you're going to hear in the excerpt Ruja Ignatova sound
4 very alarmed. And she says things in this excerpt that I'm not
5 even sure the jury will think means alarmed about hacking. I
6 mean she says in the excerpt, "You have to be F'ing careful
7 what these Russian guys can do. You cannot imagine." The
8 government's represented that's about hacking but I'm not sure
9 that's what a jury thinks when they first hear something like
10 that.

11 And what's left out of that call, your Honor, is the
12 context. This is as she's starting to discover something is
13 going on with Armenta. She seems to know that Mr. Armenta went
14 into his office to look for bugs. He comes back with: Oh, I
15 was imaging my computers. And she says in that call, "Someone
16 called me this morning saying F'er has got a bug in their
17 office. We think it's the feds. Nobody else uses bugs."

18 So this is not ordinary dialogue between
19 coconspirators. This is a very alarming situation. And what
20 we would like to argue is the defense, and I think it's a
21 reasonable argument, is: Juror, you shouldn't infer that
22 Mr. Scott and Ms. Ignatova had such extreme
23 surveillance-conscious conversations. Sure, there's reference
24 to them using cryptophone. There's also -- there's a lot of
25 e-mails about can't get them to work. So we want to argue to

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1 the jury don't take that as a sign of what these conversations
2 were like. If we can't put some context in there either from
3 the case agent or a call, I think we're deprived of that
4 argument.

5 Again, we're not looking to turn this into a field day
6 of let's talk about the case and everyone you interviewed.
7 We're talking about putting a little context in here.

8 THE COURT: Mr. DiMase -- obviously, you'll be able to
9 do that in your case in any event. I don't think Mr. Shimko is
10 going to go anywhere. He'll be here to call him in your case.

11 But, Mr. DiMase, why can't we get him on and off in
12 one fell swoop; Mr. Shimko, that is?

13 MR. DIMASE: Your Honor, I -- well one quick point. I
14 agree with the Court. Ultimately this is a weight, not
15 admissibility question. The calls are admissible and relevant.
16 The arguments that Mr. Devlin-Brown has made he can make to the
17 jury just as well as he can make to the court about the fact
18 that they were not in touch anymore. And I think that there is
19 a reasonable inference to be drawn about why she's agitated
20 because she's found out that Mr. Armenta is cooperating against
21 her with the FBI. So obviously there are reasons -- I think
22 other reasons that she is reasonably likely to be agitated.
23 Anyway, the bottomline is these are really jury arguments, not
24 about the admissibility of the evidence.

25 With respect to calling Mr. Shimko all at once. So

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1 it's not clear to me exactly what it is that the defense
2 intends to question him about. Much of -- the letter we
3 received about why Mr. Shimko should be available to testify
4 refers to impeachment of government witnesses. It would be
5 premature. Because Mr. Shimko, the government intends to call
6 him as the second witness. The people that he could
7 potentially provide impeachment information about wouldn't have
8 testified yesterday. So it would be impossible to impeach
9 them.

10 So I think it's premature to have the defense
11 questioning Mr. Shimko about those areas. And if they'd like
12 to call him again he'll be here the entire trial. He can be
13 recalled in the defense case. It's not like he's traveling
14 from out of town.

15 THE COURT: Well, look, Mr. Devlin-Brown, you can call
16 him in your case. I will give you some leeway in terms of
17 garden variety cross-examination. We'll see what he says and
18 what all you can get into. But if you want to put him on for
19 those additional purposes, you'll have to call him in your
20 case.

21 MR. DEVLIN-BROWN: That's fine, your Honor. Just to
22 clarify one thing Mr. DiMase said about our letter for saying
23 we might call Mr. Shimko for impeachment purposes, we did
24 provide a Touhy request maybe a month back listing all of the
25 case agents and saying we want you to be available in case a

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1 witness testifies differently than your notes. So it sounds
2 like the Court is directing Mr. Shimko to be available for this
3 broader line of questioning.

4 THE COURT: Absolutely.

5 MR. DEVLIN-BROWN: Thank you, your Honor.

6 MR. DIMASE: Judge, just to be clear. We intend only
7 to ask probably two or three minutes of questions to Mr. Shimko
8 regarding the authenticity of these recordings.

9 And I just want to be clear about what the Court is
10 ruling regarding cross because I am a little concerned that
11 depending on what Mr. Devlin-Brown is allowed to do on cross it
12 may look like the government is trying to hide some facts from
13 the jury when all we're really trying to do is keep his
14 testimony short and limited to the issue of authenticity.

15 THE COURT: I understand that but the rule allows for
16 cross-examination of the subject matter of the testimony and
17 issues concerning bias.

18 MR. DIMASE: Issues concerning? I didn't hear.

19 THE COURT: Bias. Impeachment of the person himself.

20 MR. DIMASE: Of Mr. Shimko, the agent?

21 THE COURT: Yes. Yes.

22 Rule 611(b) states that cross-examination should not
23 go beyond the subject matter of the direct examination and
24 matters affecting the witness's credibility. So, again, I
25 don't know how Mr. Devlin-Brown wants to conduct his

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1 cross-examination but he's certainly not limited to the two or
2 three questions that you intend to ask. OK.

3 OK. What's next?

4 MR. DIMASE: Your Honor, I think we're on to the
5 motion to suppress and perhaps it makes sense to have
6 Mr. Devlin-Brown speak to that first since they filed the
7 motion.

8 THE COURT: Or Mr. Garvin.

9 MR. GARVIN: Good morning, your Honor.

10 Your Honor, we had filed a motion to suppress in
11 particular the Samsung Galaxy cellphone of Lidia Kolesnikova.
12 That is the spouse of Mr. Scott. In the last few weeks we had
13 been advised by the United States that a second search warrant
14 had been sought and obtained and that the cellphone of
15 Mr. Scott's spouse was the subject of that, at least one of the
16 devices of that search warrant. And the defense objects
17 because our reading through the affidavit and the documents
18 shows that the original affidavit was relied upon for probable
19 cause. However, at this point when the second warrant was
20 requested in September of 2019 it is the position of the
21 defense that by that time the government realized that that
22 Samsung phone was not the phone of Mr. Scott but was the phone
23 that was used by his spouse. In particular, his wife is
24 Russian and the keyboard had been changed to Russian.
25 Mr. Scott does not speak Russian and did not use the phone as a

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1 result of that.

2 The United States has filed papers in opposition to
3 the motion suggesting that they never looked at the Samsung
4 phone and that they, therefore, did not know that the Samsung
5 phone was Mrs. Scott's phone. However, when we looked at the
6 affidavit -- the original affidavit that was executed, we found
7 that, in fact, Special Agent Shimko stated that the contents of
8 the seized devices were accessed and extracted in the affidavit
9 on page 5, paragraph 12. That seems to be inconsistent. When
10 we read that we felt that the common meaning of that was that
11 the government had, in fact, extracted the data from the phone
12 and was able to realize that they have the wrong person's
13 phone.

14 So respectfully, your Honor, we take the position that
15 the magistrate in approving the second search warrant for this
16 particular item was never notified that it was not Mr. Scott's
17 phone and, therefore, probable cause for that particular phone
18 was never established properly and that the chat that is back
19 and forth between Mr. Scott and his wife that the government
20 now seeks to introduce as evidence should be suppressed.

21 I do know that the United States has also taken the
22 position that there is a standing issue. In response to that
23 standing issue, as this Court well knows, the defense filed the
24 telephone bill for the phone reflecting that it is a phone that
25 is under Mr. Scott's name and that he pays for but he does not

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1 use. And then the United States filed a surreply stating that
2 the affidavit was self-serving and, therefore, should be
3 discarded or rejected. However, in reality the affidavit was
4 based -- or was necessary to attach the telephone record itself
5 from AT&T which establishes standing, your Honor.

6 For those reasons, we would respectfully request this
7 honorable court to suppress those chat messages on Mrs. Scott's
8 Samsung Galaxy telephone.

9 THE COURT: Let me ask you this question. Whose phone
10 was it?

11 MR. GARVIN: The person who used that phone
12 exclusively was Mrs. Scott but the person who paid for the
13 phone and was responsible for the AT&T service on the phone was
14 Mr. Scott. So it's our position, your Honor, that both persons
15 had an interest in this phone. Mr. Scott had an interest
16 because he is the one who paid for it and he is the one who was
17 named with the AT&T service. Mrs. Scott used the phone
18 exclusively.

19 THE COURT: When the government, as I understand it,
20 asked you some months ago whether there were any devices that
21 did not belong to Mr. Scott which they were willing to consider
22 returning why didn't you at that point state that, yes, you
23 have his wife's phone.

24 MR. GARVIN: Your Honor several months ago there was a
25 written request by us and I believe it was in response -- it's

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1 in my pleadings, that we, in fact, did put the government on
2 notice that they were in possession of several devices and
3 that, I quote, "The government seized and has provided an image
4 of at least fifteen devices, many of which contain no relevant
5 evidence, including devices only used by Mr. Scott's wife."
6 That is at docket 70 at page 13.

7 We had at the time Mr. Nobles was one of the lawyers
8 who was representing Mr. Scott and he was assigned the task of
9 retrieving those items that could be retrieved with the consent
10 of the government that were seized from the Massachusetts home.
11 It's our understanding that this phone was indeed seized from
12 the Massachusetts home and as the Court may well know
13 Mr. Nobles had withdrawn from the case and I guess he simply
14 just didn't follow up to see where is the status -- what was
15 the status of the Samsung phone.

16 THE COURT: OK.

17 MR. DIMASE: Judge, as a threshold matter I mean I
18 think the Court sort of narrowed the question. Whose phone is
19 it? It's Mrs. Scott's phone. I mean that's who has reasonable
20 expectation of privacy in the phone. The fact that Mr. Scott
21 paid the bills for the service doesn't really seem to alter
22 that ultimate fact. The whole point of the initial motion was
23 that this is her phone and that it shouldn't fall within the
24 scope of the second search warrant or that the government
25 failed to properly inform the judge of that fact. I think this

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1 can be easily decided on the standing issue alone. But I do
2 think it's important on the merits to be clear. We were
3 never -- the government was never told that this was her phone.
4 The photographs of the search warrant execution show clearly
5 that nobody would have been able to tell from where it was
6 recovered that it was her phone. I think it's very important,
7 as the Court knows well in this case, there was a filter team
8 involved between the prosecution team and the evidence in this
9 case. And so I mean, first of all, when the CART folks
10 extracted the data from the phone that's not a process where
11 they're looking at the actual data from the phone. They're
12 extracting it onto a computer. That data is then sitting with
13 the filter team, as we've made clear in our letter to the
14 court, and ultimately the only review they did of it was to see
15 if certain individuals were being communicated with by that
16 phone. And because the person that was clearly communicating
17 with that phone was Mr. Pike, the person who ran these funds
18 with Mr. Scott, it appeared again that it was Mr. Scott's
19 phone. The defense never told the government that this was the
20 wife's phone. And for all of those reasons the defense simply
21 cannot meet the very high burden they have under *Franks v.*
22 *Delaware* which is a substantial --

23 THE COURT: Showing.

24 MR. DIMASE: -- preliminary showing that the affiant
25 knowingly and intentionally and with reckless disregard for the

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1 truth made a false statement in the affidavit or falsely
2 omitted information from the affidavit. That showing just
3 simply is not being made here.

4 THE COURT: So the prosecution team, did Mr. Shimko in
5 particular swear out the second warrant before the prosecution
6 team learned that the phone was Mrs. Scott's?

7 MR. DIMASE: Yes, your Honor. Essentially shortly
8 before the second warrant was sworn out a member of the filter
9 team did a couple of very limited searches in the phone and
10 determined that David Pike was in communication with that
11 phone. Even the filter team did not understand at that point
12 that the phone belonged to Mr. Scott's wife. Then the search
13 warrant was sworn out by Mr. Shimko who is on the prosecution
14 team. And it was in the review of the resulting WhatsApp
15 messages from that phone that the filter team notified the
16 government and provided the messages saying these appear to be
17 messages with Mr. Scott's wife between him and his wife on her
18 phone. And that's the first time, frankly, that the filter
19 team or the prosecution team became aware that this phone
20 belonged to the wife.

21 THE COURT: The information extracted from that phone
22 will not be suppressed. I find that the defense has failed to
23 establish that Mr. Scott himself had an expectation of privacy
24 in that phone. Even if he was paying the bills for the wife's
25 use of the phone, it is clearly apparent, as the defense now

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1 indicates, that it was the wife's phone. And even if that
2 showing were not made more conclusively, I do find that the
3 defense has failed to make a substantial showing as required by
4 Franks a hearing should be held as to whether or not the agent
5 was reckless. That will not be suppressed.

6 What's next?

7 MR. DEVLIN-BROWN: I don't think there is anything
8 outstanding given the decision to put off discussion on the
9 postarrest statement.

10 THE COURT: OK. So then let's see where we are with
11 the venire. In my experience we probably won't get one until
12 around 10:30. But we'll see where we are with the jury.

13 It will be at least another 30 minutes. So be here no
14 later than 10:30.

15 MR. DEVLIN-BROWN: Thank you, your Honor.

16 MR. DIMASE: Thank you, Judge.

17 (Jury selection followed)

18 THE COURT: OK. Ms. Rivera, swear the jury.

19 (A jury of twelve and four alternates was impaneled
20 and sworn)

21 THE COURT: We're going to try to go no later than
22 five o'clock. I think we'll make that comfortably but we need
23 to give you some instructions now in terms of how we're going
24 to conduct the trial and some instructions about how to get in
25 and out of the jury room, etc. So please do bear with us.

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1 Ladies and gentlemen, you are now a jury. There is no
2 higher function in our legal system. From now on whenever you
3 enter or leave the courtroom as a jury the parties and the
4 audience will rise the same as they do for any judge because
5 you are every bit as important to this process as any judge.

6 Again, my name is Edgardo Ramos. My deputy is
7 Ms. Jazmin Rivera. And my law clerk is Daily Guerrero. You'll
8 be dealing primarily mostly with Ms. Rivera. We have a court
9 reporter here whose job it is to take down every word that's
10 said and you'll notice that there's a tag team of court
11 reporters that come in very unobtrusively throughout the day to
12 help each other.

13 I want to give you some preliminary instructions now.
14 In the American system of justice the judge and the jury have
15 separate roles. My job is to instruct you as to the law that
16 governs the case and I will give you some instructions now and
17 from time to time during the trial. At the end of the trial I
18 will give you detailed instructions about the law you will need
19 to apply when you deliberate. Your job as jurors is to
20 determine the facts based on the evidence presented at the
21 trial. You are the only triers of fact and your decisions on
22 the factual issues will determine the outcome of this case.

23 You must not take anything that I may say or do during
24 the trial as indicating what my opinion is or what your verdict
25 should be. It's not my job to even have such an opinion and if

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1 I did it shouldn't influence you in any way.

2 With respect to the evidence, you must pay close
3 attention to all of the evidence that was presented. Evidence
4 consists of the testimony of witnesses, exhibits that are
5 admitted as evidence and stipulations agreed to by the
6 attorneys. A stipulation is simply an agreement between the
7 lawyers about facts or testimony.

8 Certain things are not evidence in this case and must
9 not be considered by you. For example, statements or arguments
10 by the lawyers are not evidence. They are simply arguments in
11 which they tell you what they think the evidence proves and how
12 they think you should analyze the evidence.

13 My statements are not evidence either. Questions by
14 the lawyers are not evidence. Only the answers given by the
15 witnesses are evidence.

16 For example, if a witness is asked: It was raining
17 that day, wasn't it? And the witness says no, it wasn't. Then
18 based on that question and answer there is no evidence in the
19 case that it was raining that day, no matter how convinced the
20 lawyer sounded when he or she was asking the question.

21 Objections to questions are not evidence. The lawyers
22 are obligated to make an objection when they believe evidence
23 is being offered for an improper basis under the rules of
24 evidence. You should not be influenced by the objection or the
25 Court's ruling on it.

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1 If the objection is sustained, which is to say if I
2 determine that the objection is well placed, then ignore the
3 question and any answer that may have been given. If the
4 objection is overruled, that is to say if I believe that the
5 objection is not well placed, then you can treat the answer
6 like any other.

7 Any testimony that I strike or tell you to disregard
8 is not evidence and you must not consider it.

9 If I instruct you that some evidence is only to be
10 considered for a certain purpose, you must follow that
11 instruction as well.

12 And, of course, anything that you may see or hear
13 outside the courtroom is not evidence and should be disregarded
14 by you.

15 In deciding the facts of the case you will have to
16 decide the credibility of witnesses; that is, how truthful and
17 believable they are. How do you do that? How do you decide
18 what to believe and what not to believe?

19 Well you're going to listen to the witnesses and
20 observe them and then decide just as you would decide such
21 questions everyday in your ordinary life. Did they know what
22 they were talking about? Were they honest, open, and truthful?
23 Did they have a reason to falsify, exaggerate, or distort their
24 testimony? Is there any reason to think they might be mistaken
25 about what they're telling you? How did their testimony square

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1 with the other evidence in the case?

2 So what the witness says, the way the witness says it,
3 and the rest of the evidence in the case will play important
4 roles in your reaching a judgment as to whether or not you can
5 accept the witness's testimony as reliable.

6 As the trial proceeds you may have impressions of a
7 witness or subject but you must not allow these impressions to
8 become fixed or hardened because if you do in a sense you
9 foreclose consideration of the testimony of other witnesses or
10 other evidence that may be presented after the witness you've
11 heard. This would be unfair to one side or the other. You
12 should not reach any conclusions until you have all of the
13 evidence behind you -- in front of you. Please, please keep an
14 open mind throughout the evidence portion of the case.

15 I have to give you some rules so that you are not
16 influenced in any way by anything that might occur outside the
17 courtroom. So I'm giving you the specific set of instructions.

18 First, do not discuss this case with anyone while the
19 case is going on. That includes friends and members of your
20 own family. You may tell your friends and family that you're a
21 juror in a case and that it is expected to last two or three
22 weeks. But don't tell them anything else about the case until
23 after you've been discharged. Not discussing the case includes
24 not blogging, Tweeting, posting on Instagram or Facebook or any
25 other social media.

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1 My instruction that you not discuss the case also
2 includes not discussing it even amongst yourselves while the
3 trial is going on. It will be your duty to discuss the case
4 amongst yourselves later on but that can happen only after all
5 of the evidence is in and the case is given to you to discuss
6 and decide in the jury room.

7 Next, you are not to read anything in the newspapers
8 or elsewhere about this case if that should occur. You are
9 also not to listen or to view any reporting about this case if
10 it should be broadcast on TV, over the radio, or on the
11 internet.

12 Next, do not do any research or any investigation
13 about the case on your own. Do not go visit any place you may
14 hear described during the trial. Don't do any research on the
15 internet or in the library or any other reference source.
16 Don't Google anyone.

17 Next, you are not allowed to allow anyone to speak to
18 you about this case. If you're approached by anyone to speak
19 about it, politely tell them that the judge has directed you
20 not to do so. If any person approaches you or seeks to contact
21 you about the case, you are required to report the incident
22 promptly to me and you can do that by telling Ms. Rivera.

23 The lawyers and the parties and the witnesses are not
24 supposed to talk to the jury outside of the courtroom, even to
25 offer a friendly greeting. So if you happen to see any of them

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1 outside the courtroom they will and should ignore you. Please
2 take no offense to this. They will only be acting properly by
3 doing so. Indeed, they will be following my express
4 instructions. Courts have a hard and fast rule that the
5 lawyers, parties, and witnesses cannot speak to jurors, period.

6 Finally let me say a few words about trial procedure.
7 The trial has five parts. First, each side will have an
8 opportunity to make an opening statement to you and they will
9 do that tomorrow morning first thing. As I've already told
10 you, these statements are not evidence. Their purpose is to
11 give you an idea in advance the evidence that the lawyers
12 expect you to hear from the witnesses.

13 Second, after the opening statements you will hear the
14 testimony of the witnesses. The government's witnesses go
15 first. Each witness will give direct testimony and then he or
16 she may be cross-examined by the other side.

17 Following the government's case, the defendant may but
18 need not present witnesses and other evidence. If the
19 defendant does present witnesses, those witnesses will be
20 examined and cross-examined just as the government's witnesses
21 were.

22 Third, after all of the evidence has been received
23 each side will have an opportunity to make closing arguments.
24 These arguments also are not themselves evidence.

25 Fourth, after the arguments or summations, as they are

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1 called, I will give you detailed instructions as to the law
2 that applies and controls in this case. And you must follow
3 those instructions. These instructions to the jury are
4 referred to as the jury charge.

5 Finally, and most importantly, after the charge you
6 will go to the jury room to deliberate and discuss the evidence
7 in order to decide the facts and render a verdict.

8 A few housekeeping matters before we go on.
9 Ms. Rivera will show you to the jury room. That's where you'll
10 report in the morning. She'll also give you her telephone
11 number where you can reach her if there is an emergency.
12 Please give her your home, work, and cell numbers just in case
13 we have a last minute schedule change or other problem.

14 Our trial day will begin at 9:30 and will end at 2:30.
15 We'll start at 9:30 and go an hour-and-a-half and take a
16 fifteen-minute break; go another hour-and-a-half, followed by a
17 second fifteen-minute break; and then go another
18 hour-and-a-half. So, as you'll note, we won't have a
19 traditional lunch break but we will have snacks for you during
20 those breaks and we'll also have breakfast for you in the
21 mornings; bagels and that type of stuff. Don't get too
22 excited. It's just from our cafeteria in the building. But it
23 will be here by probably no later than nine o'clock so that
24 gives you an incentive to be here so we can get started right
25 on time at 9:30. I have found that this shorter trial day is a

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1 very much preferred by jurors because it gives them a large
2 portion at the end of the day to take care of their other
3 obligations. If you need a break before the scheduled break,
4 just raise your hand.

5 Please be on time in the morning and after the breaks.
6 If you're late, you'll be keeping everyone waiting. If you
7 look around here, ladies and gentlemen, in addition to the
8 sixteen of you in the jury box, there's another fifteen or so
9 that are sitting either on the bench or in the well of the
10 court and if any one of you is late everyone else,
11 approximately 34 people, will be sitting here unable to do
12 anything waiting for you because nothing can happen in a trial
13 unless all of the jurors are here. So, please, please be on
14 time.

15 My promise to you is that I will make sure that myself
16 and my staff are here always on time and that the lawyers are
17 here and that there are witnesses ready to go. That is my
18 solemn commitment to you and I would ask that you please do
19 that so that we can all get you back to your lives as
20 efficiently and as soon as possible.

21 If you wish, you may take notes and Ms. Rivera will
22 provide you with pads and pens for that purpose. But if you do
23 take notes you must leave them in the jury room when you go
24 home at the end of the day. And remember that any notes you
25 take are for yourself only and they're not to be relied on by

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1 anyone else.

2 It's completely up to you whether you want to take
3 notes. Let me remind you that we do have a court reporter who
4 will take down every word that's said throughout the trial so
5 you don't, strictly speaking, need to take notes. However,
6 some people find that it helps them concentrate. And when you
7 deliberate, however, you should discuss what the evidence was
8 and not what one juror's or another juror's notes do or do not
9 say.

10 So with that, I will have Ms. Rivera take you in the
11 jury room and she'll describe to you how to get in and out of
12 the courtroom and how to get in and out of the jury room.

13 There will be breakfast tomorrow here in the morning.
14 You should endeavor to be here no later than 9:15 and we'll get
15 ready bright and early at 9:30 and I will make sure I will
16 police all of the attorneys to make sure that when we have a
17 15-minute break it is a 15-minute break and not a 16-minute
18 break or a 17-minute break. And we'll see you tomorrow.

19 Until then, do not discuss the case amongst
20 yourselves. Do not do any research about the case. Do not
21 read anything in the media about the case or on the internet
22 about the case. Have a very, very good evening. We'll see you
23 tomorrow morning so we can get started at 9:30.

24 (Jury not present)

25 THE COURT: I forgot to tell them that we weren't

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1 sitting on Veterans Day. Can you tell Jazmin to tell them that
2 we're not sitting on Veterans Day.

3 Is there any work for me to do? Mr. DiMase?

4 MR. DIMASE: Not that I'm aware of at this time.

5 THE COURT: Mr. Devlin-Brown.

6 MR. DEVLIN-BROWN: I don't think so either.

7 THE COURT: So be here by nine or try to be around
8 especially if you know that there's something that needs to be
9 addressed. In my experience there's always something that
10 needs to be addressed so I will be ready to go by no later than
11 9 a.m. and you should also.

12 Have a very pleasant evening, folks.

13 (Adjourned to November 5, 2019 at 9 a.m.)
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